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Settle the Case? – "Them's Fightin' Words!"

By William A. Bogdan*

The scene is repeated on a daily basis in attorney/client meetings. "The harassment never happened." "The employee's making it up." "We need an immediate aggressive response." "We need to fight them hard up front; the employee won't be able to take the heat." These statements will either be preceded or followed with "but we can't afford to spend a lot of money."

The employer with limited resources—in other words, every employer—often sets its sights on striking fear into the heart of the plaintiff. If the employer's attorney raises the prospect of settlement at that first meeting, you'll hear: "That's not the message we want to send." Or, "I've got a business to run; every employee will file a lawsuit if we pay off this one." Or, "You're not aggressive enough; we want other counsel."

This kind of response ignores two realities in employment litigation. First, one-third of the employee's claims will be found to be true two-thirds of the way through the lawsuit. Employers sued for the first time never believe this; employers who have experienced prior suits will nod their head in resignation. Employee handbooks are perfect; the employees and supervisors who have to follow them are not. The ex-employee has already convinced one person that the case has merit—the ex-employee's lawyer. In fact, the lawyer is convinced enough to invest the resources to pursue the case. If the employee convinces just nine more people (jurors), the next stop is the headlines.

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Second, the most effective way to put an end to the suit is to strike fear in the heart of the employee's attorney that there might not be a pot of attorney's fees at the end of the litigation rainbow. Often the most aggressive, fear-provoking move the limited-resource employer can take is to issue an attorney fee-limiting Code of Civil Procedure §998 settlement offer early in the case, as suggested by the First District Court of Appeal's opinion in *Greene v. Dillingham Construction NA, Inc.* (2002) 101 Cal.App. 4th 418.

Mr. Greene claimed that he saw a noose displayed in his workplace. He sued his employer for harassment, discrimination, retaliation, and made a claim for punitive damages in March 1997. In February 1999, the employer made an offer

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of $50,000 while its motion for summary judgment was pending. After the motion was denied, the employer offered $1 million at a July 1999 mediation. The offer was held open for 48 hours, and was contingent upon a confidentiality agreement. The offer lapsed, plaintiff jettisoned his claim for discrimination, and went to trial on his remaining theories.

The jury found in the employer's favor on the retaliation theory and the punitive damage claim. However, it awarded the employee $490,000 on his harassment claim. The judge then awarded Greene his attorney's fees in an amount more than twice what the jury had given him on the harassment claim—$1,095,794.55. A verdict of less than a half million dollars ballooned to a price tag in excess of $1.5 million dollars. The employer appealed claiming that because plaintiff's $490,000 verdict was less than the $1 million offered at mediation, plaintiff should not be entitled to attorney's fees. The Court of Appeal rejected prior case law supporting the employer's position, and affirmed the attorney fee award because the employer's offer had not been in the form of §998 offer.

Under §998, a plaintiff who refuses a reasonable settlement offer in employment litigation runs the risk of losing post-offer costs and attorney's fees if the employee fails to obtain a more favorable judgment at trial. A §998 offer must be in writing, and must be held open for 10 days prior to trial or 30 days after the offer is made. Though the concept is similar to an offer of judgment under Federal Rule of Civil Procedure 68, §998 does not require that the defendant offer judgment against it as part of the settlement. Rather, the employer may simply require the execution of a release and dismissal of plaintiff's complaint in exchange for the settlement. *See Goldstein v. Bank of San Pedro* (1994) 27 Cal.App.4th 899.

The employer in *Greene* relied on *Meister v. Regents of the University of California* (1998) 67 Cal.App 4th 437 for the proposition that an informal settlement offer could be used to limit the recovery of attorney's fees after trial. Consistent with the reasoning in *Meister*, the employer maintained that employees not be rewarded for going to trial when the employee could have settled for more money earlier in the litigation.

The Greene Court disagreed with the reasoning in Meister and rejected the employer's position. Though the court accepted the concept that a §998 settlement offer could limit or even bar post-offer attorneys' fees, the court held that an informal settlement offer during mediation failed to provide the certainty and procedural protections provided under the code.

COMPLYING WITH §998

One problem with the employer's attempt to rely on an offer conveyed at mediation was that mediation proceedings are intended to be confidential. Because the employer communicated the offer in the course of a confidential mediation session, the court noted that "not only would disclosure of the settlement offer violate Evidence Code §1119 [prohibiting evidence of any writing prepared in the course of mediation], the penalties would frustrate the public policy favoring settlement that is served by mediation."

The Greene court ruled that if a party wants to obtain the benefits of the policy underlying §998 offers, it must provide the procedural protections guaranteed under that section. The court found that the informal settlement offer failed to satisfy the conditions of §998. The settlement offer was held open for 48 hours rather than 30 days as required by the code. The employer's earlier $50,000 offer had been in the form of a §998 offer, but was of no value because the verdict far exceeded that statutory offer.

In support of its ruling, the court cited to five federal cases which held that attorney's fees should not be reduced unless the defendant's offer complied with the terms of Federal Rule of Civil Procedure §68. The Greene court quoted the Second Circuit Court of Appeals in *Ortiz v. Regan* (2d Cir. 1992) 980 F.2nd 138, 140-141: "A district court should not rely on informal negotiations in hindsight to determine whether further litigation was warranted and, accordingly, whether attorney's fees should be awarded. Otherwise, plaintiffs with meritori-

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Finding Your Way Through a Maze:

Representing Corporate Officers and Directors in a Criminal Investigation

By Nanci L. Clarence* and Greg Gilchrist**

Corporate crime is in the spotlight. It is a hot topic not only in the headlines, but also in U.S. Attorney's Offices around the nation. Last July, after months of headline-grabbing corporate misdeeds, President Bush signed an Executive Order establishing the Corporate Fraud Task Force.[1] And, the Administration continues to emphasize its commitment to investigating and prosecuting corporate crime.[2]

This all means that your organizational clients are more likely that ever to be faced with an investigation of some sort.[3] And it means that the stakes are higher in those situations where the corporation, or the corporation's attorney, learns about possible illegal conduct. Whether F.B.I. agents raid corporate offices or an employee reports possible illegal conduct – or anything in between – you need to be prepared. And crucial to being prepared is knowing what the corporation's lawyer can do, and for whom he can do it.

WHO THE CORPORATE LAWYER REPRESENTS

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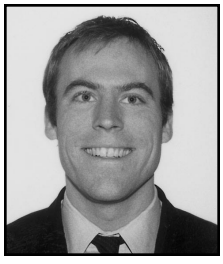

Lawyers who represent individuals rarely need to stop and ask themselves whose interests they should be protecting at any point in time. However, in representing a corporation, particularly one facing a criminal investigation, the questions "who do I represent," and "whose interests could this decision affect" should be posed constantly. The answers are not always obvious, but the questions must always be asked in order to make the best decisions.

The corporation's lawyer represents the corporation, that is, the organization itself.[4]

In representing an organization, a member shall conform his or her representation to the concept that the client is the organization itself, acting through its highest authorized officer, employee, body, or constituent overseeing the particular engagement.

Rules of Prof. Conduct of the State Bar of California, Rule 3-600. The description of who a corporation's lawyer represents is both so obvious and so cryptic as to be largely unhelpful. The truism needs unraveling.

A corporation is the construct of a particular legal system. It has no existence beyond those laws that define it. So, when the Rules of Professional Conduct tell a corporate attorney that she represents the corporation itself, not much has been clarified.

Of course, a corporation "can only act through its agents and officers."[5] And, there can be no crime without an "act."[6] Thus, whenever a corporation is being investigated regarding alleged criminal wrongdoing, there must be a natural person on whose act or failure to act criminal liability would attach. That person's relationship to the corporation will do much to determine whether and to what extent the corporation itself will be held criminally liable.

But by representing the corporation, the corporate attorney does not represent that person whose act or failure to act led to the investigation. Additionally, the corporate attorney cannot assume that the interests of the individuals who run, work for, or perform tasks on behalf of the corporation are aligned with the interests of the corporation. Indeed, the corporate attorney cannot even assume the corporate interests are aligned with those of the people to whom he reports, and who have the power to terminate his employment.[7]

In trying to flesh out the corporate interest, one might be tempted to find a proxy in the shareholders. After all, "[t]he most basic principle of corporate law is that a corporation is to be primarily run for the pecuniary benefit of its shareholders."[8] However, California courts have consistently rejected the argument that a corporate attorney represents the interests of the shareholders.[9]

In the end, there really is more to say about whom a corporate attorney does not represent than whom she does represent: she does not represent the officers, directors, employees or agents of the corporation, and she does not represent the shareholders for whose benefit the corporation exists. She represents the corporation.

WHAT THE CORPORATE LAWYER SHOULD DO WHEN THE CORPORATION IS CONFRONTED WITH POSSIBLE ILLEGAL CONDUCT

How a corporation should react to a particular possible crime depends on many factors. The first step is to ascertain what is known. What allegedly happened? Who allegedly is involved? Who in the corporation knew about the alleged conduct? What do the law enforcement authorities know? With whom have law enforcement authorities spoken? Each of these questions should be answered – even if not completely – immediately.

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Criminal Investigation

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CONDUCTING THE INITIAL INVESTIGATION

The corporation should immediately retain its own criminal counsel. Traditionally, corporations could not be held criminally liable[10] – thus, there was no role for a corporate criminal. This has long since ceased to be the case and, if there was any public confusion on the issue, the recent trial of Arthur Andersen LLP should have ended it. A corporation can and often will be held criminally liable based on the conduct of its officers, directors, employees or other agents.

And, a corporation faces severe penalties for the criminal conduct of its employees or agents. The federal Sentencing Guidelines devote an entire chapter to the sentencing of organizations. While it is true that a corporation cannot be sentenced to jail time, it can be fined; it can be subjected to onerous probation conditions; it can be debarred and suspended from government contracts; and it can lose licenses necessary to its business. Fines have been levied up to half billion dollars.

CREATING A COMMITTEE TO GUIDE THE CORPORATION THROUGH THE INVESTIGATION

As discussed above, the corporation acts only through people – thus, outside criminal counsel faces the same issues about defining the client as does an in-house attorney. And, unlike an in-house attorney, outside counsel will not automatically know to whom she reports.

Criminal counsel must report to and act at all times on behalf of the corporation. And the persons to whom she reports should be completely uninvolved in the alleged conduct which spawned the investigation. Generally, a special committee of Board members will be convened for the express purposes of retaining criminal counsel,[11] guiding criminal counsel through an independent internal investigation, and reporting back to the Board at the conclusion of the investigation. The special committee should have autonomy to make the decisions that will need to be made throughout the course of the investigation (e.g., whether to take adverse employment action against suspects, whether to enter into joint defense agreements, whether to indemnify, etc.). These can be weighty tasks and will pose difficult decisions that may impact the future of the corporation.

LAWYERS FOR EMPLOYEES, OFFICERS, DIRECTORS, AND OTHERS

Law enforcement authorities will be approaching your client's employees or other agents for interviews. Are they represented? Who will pay for their lawyers? The issues presented by indemnification and advancement of fees are myriad and complex. However, the aspect of indemnification that is most difficult is simply stated: it is not in the corporation's interest to indemnify those who committed crimes, but you cannot know with certainty who committed crimes until you know who is convicted. Waiting until employees are convicted or acquitted (or, for those who will never be charged, until the statute of limitations runs) would render indemnification largely useless. Therefore, decisions about the corporate interest must be made with substantially less than perfect information.

PREVENTING DESTRUCTION OF EVIDENCE

Steps to prevent destruction of evidence will almost always be appropriate. A corporate document retention policy drafted without an eye toward potential criminal investigations may prove completely insufficient when an investigation is pending. Exactly what steps are needed will depend on the nature of the corporation, the nature of the investigation, the type of technology in place, the scope of the allegations and numerous other factors.

WHY SPEED MATTERS

Even after the execution of a search warrant, the government may spend months or even years conducting a criminal investigation. The sometimes glacial pace of the investigation might lull in-house counsel or the board of directors out of their sense of urgency. This is a mistake. A key to successfully guiding a corporation through this process is getting criminal counsel to act quickly and early.

But most important is to define the goal of the initial investigation. The internal investigation should begin as soon as the corporation has information that causes it to suspect the possibility of illegal conduct by its employees or agents. And the goal of the initial investigation is to decide what to do with that information.

Whenever a corporation learns of potential criminal conduct by one of its employees or agents, the single most important decision it will need to make is whether and to what extent to cooperate with law enforcement authorities. And, regardless of what decision the corporation makes on this issue, time is of the utmost essence. Cooperation can yield tremendous benefits to the corporation. On the other hand, assisting individuals defend against allegations can yield equally important benefits. In either case, however, the potential benefits diminish exponentially with delay.

THE END OF THE INVESTIGATION

The investigation generally ends with a report by criminal counsel to the Board or special committee convened to oversee the investigation. The report should outline what was investigated, what was not investigated, what steps were taken and what steps remain to be taken.

Generally, a recommendation will be made as to the best approaches the corporation may have to convince the prosecutor not to indict. Former Deputy Attorney General Eric Holder, Jr. published the U.S. Department of Justice guidelines to "provide[] guidance as to what factors should generally inform a prosecutor in making the decision whether to charge a corporation in a particular case."[12] These guidelines

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Mediation the Northern District Way

By Wendy Rouder*

Recently a colleague told of a case he handled in which his plaintiff-client, working in the technology department of a large quasi-public employer, suffered "harassment and discrimination" on the job. It seems his client had a long-standing personality conflict with a co-worker and the conflict grew to such an extent that the plaintiff's blood pressure became dangerously high and she suffered from regular abdominal spasms. The plaintiff claimed that the last straw to her tolerating the job came on a day when the co-worker intentionally used loud profanities in her presence, and when she confronted the co-worker, the supervisor overheard the exchange and accused the plaintiff of inappropriate behavior for "raising her voice at the worksite." This accusation so upset the plaintiff that she was hospitalized the next day for uncontrolled high blood pressure. By the time a lawsuit for racial discrimination and harassment (plaintiff was the only Hispanic in her department) was filed, the plaintiff had been off work for six months.

At a mediation held early in the litigation it became clear, first to the mediator and then to the defendant, that plaintiff's focus was not so much on the co-worker, but with the supervisor who seemed to "always favor" the co-worker. At first the manager who attended the mediation session as the employer's representative refused to concede that the supervisor may have been insensitive or erred in judgment (the mediator forestalled a discussion of the merits of the racial discrimination evidence). The mediator suggested that another session be held including the supervisor. The manager agreed. At a second mediation session it developed that the supervisor was unduly concerned about not revealing to plaintiff what disciplinary steps she took with regard to the co-worker, and that perhaps this concern for the co-workers privacy made the supervisor seem strident and insensitive. The supervisor offered plaintiff an apology if her "concerns for privacy" made her seem wrongly accusatory or unobjective. The plaintiff and defendant developed a plan for a regularly scheduled on-the-job airing of interpersonal issues with a trained employment counselor as a facilitator. Plaintiff then agreed to settle for a make-whole remedy and a nominal sum for "pain and suffering".

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This anecdote illustrates the value of spending the time in mediation to look at factors that either aid or obstruct settlement other than a bottom line dollar. It is a value that permeates mediation in the United States District Court for the Northern District of California. Imagine receiving a phone call from a mediator prior to the mediation asking both counsels "What are the parties' interests in this case?" This query is typical in the Northern District, but too often this query fails to resonate with attorneys unfamiliar with Northern District ADR. However, attorneys who regularly practice in the District and mediators trained by the District's ADR staff attorneys know that looking to interests other than bottom-line dollars often is a critical aid to settlement.

Not a Traditional Settlement Conference

Mediation in the Northern District is not designed to be akin to a state court settlement conference. Practitioners experiencing mediation in the District will not find the arm-bending persona of a state court judge or the time constraints of being just another case on a crowded settlement docket. Instead those labor law attorneys familiar with interest-based collective bargaining will recognize the mediator's trained approach: take the time to identify interests rather than commence with a statement of positions, forestall approaching dollar amounts until all aspects of the case and the goals of the parties are understood by both the mediator and each side, and explore the best and worst alternatives to a negotiated settlement. Underlying mediation in the Northern District is an assumption that the process of negotiation can be one of problem-solving rather than seeking "a win", that the parties can and should collaborate in order to accommodate each's interests rather than be pressured into a compromise. This being said, the Court also recognizes that the cases that may be most amenable to mediation are those in which some interest other than (or in addition to) money is driving the litigation.[1]

District mediators are encouraged by the Court to spend time getting to know the key players rather than to rapidly throw out obvious truisms about the risks of trial or undertake efforts to "make the other side see the light". The goals are evident in the language of the Local Rule (6-1) that describes the mediator as someone who "improves communication across party lines, helps parties articulate their interests and understand those of their opponent, probes the strengths and weaknesses of each party's legal positions, identifies areas of agreement and helps generate options for a mutually agreeable resolution to the dispute. The mediator generally does not give an overall evaluation of the case. A hallmark of mediation is its capacity to expand traditional settlement discussions and broaden resolution options, often by exploring litigant needs and interests that may be formally independent of the legal issues in controversy."

Under the leadership of Northern District Magistrate Wayne Brazil, principal architect of the Northern District's ADR program, and the skilled tutelage of the attorneys who administer the program, attorney-mediators receive multiple-day training on how to conduct mediation "the Northern District way". One prevalent theme in the training is to eschew

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Mediation the Northern District Way

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early discussion of dollar values, both by the mediator and the parties. From the outset of planning for a mediation session and through the session itself the parties are invited to answer the following questions on behalf of their clients:

- Can you tell me your client's interests other than their "positions on the case"? How can these interests be met?
- Do you know what the other side's interests are and how these can be met?
- Have you explored with your client the best and worst-case scenarios if the case does not settle?
- Do you and your client know the strengths and weaknesses of your case? Of the opposing party's case?
- Have you prepared and shared with your client an estimated budged to litigate the case through trial?
- Does you client understand that he or she is obligated to be present at the mediation and is s/he prepared to devote the whole day to it should you and s/he determine that amount of time to be beneficial?
- Are you prepared to have your client actively participate in the mediation – to reveal his humanity to the other side?
- Are you prepared to share with the mediator – either in open or closed session – the secrets and smoking guns in the case as you see them?
- Does your client understand the confidentiality rules that govern Northern District mediation?
- Does your client understand what the process will be during the course of the mediation?
- Does your client understand what the range of outcomes will be with regard to the mediation; how mediation differs from a settlement conference, arbitration or trial, and that the mediator has no power to impose a settlement?
- Have you talked with your client about having additional persons attend the mediation if you and your client think that would be beneficial?
- Are you prepared to provide the mediator with a helpful mediation statement?
- To what extent are you familiar with ADR Local Rule 6?

The Northern District Way

In 1998 Congress passed the Alternative Dispute Resolution Act requiring federal courts to adopt an official "alternative dispute resolution" program for all civil actions (28 U.S. C. Section 651-658). The Northern District is unique not only in its utilization of multiple ADR processes, but in the fact that its ADR program was in place long before 1998 and that the Court devotes considerable attention and resources to it. Civil litigants in the Northern District are invited to elect[2] from among several ADR alternatives including Mediation, Early Neutral Evaluation, Non-binding Arbitration, or a judicial officer conducted Settlement Conference. Unless the parties in the ADR Multi-Option program stipulate to a particular ADR process, the Court will select the process in conference with the parties.

If mediation is chosen, the Court selects and assigns the neutral mediator to the case (of course, conflicts of interest will disqualify a mediator). Attorneys wishing to serve as District Court neutrals are carefully screened for subject matter expertise and litigation experience. Mediators are required to have at least seven years of law practice (but the mediator need not be an attorney if he or she possesses other mediation-related expertise), knowledge of civil litigation in the federal court, and experience and training in negotiation techniques and mediation.

Mediators volunteer their time for the first four hours of each case. Continuing the session beyond four hours is done only by agreement with the parties and mediator, and upon disclosure by the mediator of whether the mediator will charge up to $200 per hour for the next four hours. If all agree to continue further after eight hours, the mediator may charge any rate the parties agree to pay.

Written mediation statements from the parties for the mediator are required and certain statement contents are spelled out under ADR L.R. 6-7. The mediator has the authority to request that the parties supplement their statements (which are to be exchanged) with a confidential statement for the mediator only. In any event, no statement is to be filed with the court and is never to be shared with the court. The confidentiality rules that apply generally to the mediation process in terms of having the substantive communications be kept confidential from the court extend to the written statement (ADR L.R 6-11).[3]

Too often the parties fail to accomplish two critical tasks with regard to the requirement that the mediation statement "briefly describe the substance of the suit, addressing the party's view of key liability issues and damages and discussing key evidence": 1. The statements fail to give a clear chronology of both the events leading up to the litigation and the litigation itself; and 2. The statements fail to emphasize what facts and law are truly in dispute. This neutral has "rewritten" ADR statements to provide herself with a clear chronology and a clear statement of contested facts and legal issues.

Coming prepared to a Northern District mediation means more than figuring out which person meets the Local Rule 6-9 attendance requirements. It means being prepared to let your client be heard by not only the mediator, but also by the opposition. It means being prepared to reveal your best arguments, rather than secreting them for trial. It means deferring – or even abandoning – the idea of going to trial based upon a smoking gun.

Mediation the Northern District way will became the model for other districts. In 1990 the Federal Judicial Center studied the Northern District's ADR program and reported of its very favorable reception by both judges and participating attorneys. Although the report did not focus on mediation, many practitioners who professionally negotiate hold in esteem "interest based" mediation. And, interest based mediation does not precludes positional-based communication either in the mediation itself or in a later settlement conference at which the full panoply of judicial arm twisting may very well re-appear.

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Legislative Update

By Sam McAdam and Steve Greene*

This past year has been the busiest year for the Legislature concerning employment legislation in the four years of Governor Gray Davis' administration. Section II below summarizes the key bills signed into law. In the sections below we summarize the bills signed into law and then those passed by the Legislature this year but vetoed by the Governor.

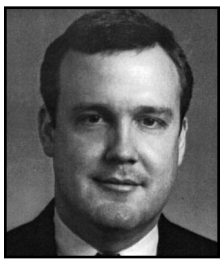
LEGISLATION SIGNED INTO LAW IN 2002

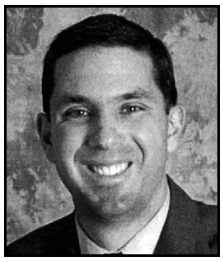
SB 1661 (Keuhl) "Paid Family Leave Act" Insurance Benefit

The new law provides up to six weeks in a 12 month period of wage replacement benefits to workers who take time off work to care for a seriously ill child, spouse, parent, domestic partner or to bond with a new child. The "weekly benefit amount" is determined by the State Disability Insurance (SDI) program, which generally provides up to 55-60 percent of an employee's weekly wage rate to individuals who are unable to work because of their own illness. SDI benefits are tied to the level of the State workers' compensation benefits. The maximum weekly benefit under these programs is $728/week in 2004, $840/week in 2005 and after that date, the benefit will be increased by an amount equal to the percentage increase in the "state average weekly wage" compared to the prior year.

AB 1068/AB 2868 (Wright) California Investigative Consumer Agencies Act.

The Governor signed into law the clean up bills to AB 655 passed last year, which raised questions about whether under the California Investigative Consumer Agencies Act (Civil Code § 1786 et seq.) employers were required to disclose internal investigation notes and employee reference checks. The Act governs generally both the use of investigative consumer reporting agencies and background checks by employers pertaining to "character, general reputation, personal characteristics, and mode of living." The new law, which was supported by employer groups, greatly narrows the circumstances in which the employer must disclose background reports.





*Sam McAdam (above) and Steve Greene (below) are attorneys in the Sacramento office of Seyfarth Shaw.

AB 2957 (Koretz) "California WARN Act"

This new law is modeled in some part on the federal Worker Adjustment and Retraining Notification Act (WARN Act) that requires notification of workers before a mass layoff. The California law enacted precludes employers from ordering a mass layoff, relocation, or termination of an industrial or commercial facility employing 75 or more persons within the preceding 12 months, without first giving 60 days notice.

AB 1599 (Negrete-McLeod) New Protections Against Age Discrimination

AB 1599 adds "age" as a protected class to the provisions of FEHA which prohibits discrimination in the terms and conditions of employment. Under existing law, age discrimination was prohibited only in hiring, discipline and termination. This bill is intended to reverse the holding of the California Supreme Court's decision in *Esberg v. Union Oil Company*, which held that an employer is not barred by FEHA from providing educational benefits to younger workers while denying such benefits to older employees. Thus, under the new law if an employer offers, for example, a tuition benefit to a younger employee to obtain an advanced degree, the employer must be willing to provide such benefit to older employees. The law becomes effective on January 1, 2002 but there is some question whether it will apply retroactively.

SB 1471 (Romero) Absence Control Policies and Kin Care

SB 1471 provides that if an employer maintains an absence control policy that counts sick leave (allowed under Labor Code § 233 [Kin Care]) used to attend to an illness of a child, parent, spouse, or domestic partner as a basis for discipline, demotion, discharge, or suspension, the policy would be a per se violation of the law, entitling an employee working under the policy to appropriate legal and equitable relief. Governor Davis vetoed a similar bill last year. There is no apparent explanation as to why he signed it this year.

AB 2895 (Shelley) Protections for Disclosure of Working Conditions

California law currently provides that an employer may not require an employee to refrain from disclosing the amount of his or her wages or require an employee to sign a waiver denying him or her the right to disclose the amount of his or her wages. Existing law also prohibits an employer from discharging, disciplining, or otherwise discriminate against an employee, for job advancement, who discloses the amount of his or her wages.

This bill does two things. First, it broadens the protections of existing law by eliminating the condition that the adverse action be related to an employee's job advancement. Thus, any adverse employment action taken because the employee discloses the amount of his wages is actionable. Second, this bill would prohibit an employer from requiring employees not to disclose information about the employer's working conditions.

Legislative Update

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SB 688 (Burton) Statute of Limitations and Summary Judgment.

In a highly publicized bill, the Governor extended the one year statute of limitations for personal injury and wrongful death claims to 2 years. The ostensible reason for the doubling of the limitations period was to allow victims of the September 11 terrorist attack another year to file claims. In the employment setting, the new law effectively extends the limitations period for filing a common law wrongful termination claim.

In an entirely unrelated provision of SB 688, the bill revised the summary judgment service and filing deadline from 28 days notice to 75 days. The bill adds an ex parte mechanism for those opposing motions for summary judgment to seek a continuance to conduct further discovery and protects the opposition party from any delay caused by the moving party from allowing the discovery to proceed. The bill also requires a reviewing court to allow supplemental briefing on grounds granting summary adjudication not relied upon by the trial court. The intent of these measures was to allow plaintiffs more time and opportunity to oppose motions for summary judgment. A plaintiff now has plenty of time to notice depositions or conduct written discovery on shortened notice between the time of being served with the summary judgment motion and the time that plaintiff's opposition is due.

AB 2816 (Shelly) Temporary Labor.

This bill requires temporary employee placement services who enter into contracts for the employment of temporary workers to be solely responsible for providing workers' compensation insurance to those contract employees, although the premiums to be paid depend on the contractor's "experience modification rating." The bill would also establish parameters on the premium paid for such insurance. The contractor has the added obligation to notify the temporary service if the employee is assigned to a public works project or is reassigned to a new position.

AB 2412 (Diaz). Payroll records.

Employers are currently required to furnish their employees with certain payroll information, and current or former employees of an employer have the right to inspect and copy these records. This bill applies a time deadline for responding to such requests from current or former employees, mandating compliance within 21 calendar days from the date of the request. The bill provides for a civil penalty against employers who fail to comply with requests, and for injunctive relief to ensure compliance.

AB 2195 (Corbett) Victims of Domestic Violence.

This bill extends existing protections against adverse employment actions against victims of domestic violence who take time off from work, as specified, to victims of sexual assault.

AB 2509 (Goldberg). Local jurisdiction labor standards.

This bill provides that local governments may establish and apply their own labor standards, with regard to the expenditure of state funds, so long as the local standards do not conflict with, and are not preempted by, state law.

AB 2837 (Koretz) Worker Safety.

This bill requires the Division of Occupational Safety and Health (DOSH) to investigate workplace accidents resulting in death within 24 hours; makes employers who fail to report workplace accidents resulting in death to DOSH liable for civil penalties and misdemeanor prosecution; requires the Department of Industrial Relations (DIR) to develop protocols for referral of cases that may involve criminal conduct to county district attorneys; and requires DOSH to employ bilingual employees for certain contact and investigative positions, provide translators for certain hearings, and provide key written materials in non-English languages.

AB 1448 (Maddox) Prevailing Wage Laws.

Existing law provides that a contractor or subcontractor who employs a worker on a public works project in violation of limits on hours that may be worked in a day or week is liable for a specified penalty. Those provisions would have expired January 1, 2003. This bill deletes the January 1, 2003, repeal of these wage and hour provisions, thus keeping these provisions in effect indefinitely.

AB 2596/SB 1156 Farm Worker "Binding Mediation"

These bills were analyzed at length in the most recent issue of the Labor and Employment Law Quarterly. The governor's bill signing statement includes the following:

These bills represent a significant improvement over SB 1736 in a number of ways:

- Limited to a pilot program - 5 years with a total of 75 cases
- Limited to farms with 25 or more workers
- Applies to first contracts only
- The parties must have attempted to negotiate for one year if the negotiations began before January 1, 2003, or have negotiated for 6 months for negotiations entered into after January 1, 2003.
- If the bargaining unit was first certified before January 2003, the employer must have been found to have committed an unfair labor practice if there is to be ALRB supervised mediation

SB 1818 (Romero) Immigration status.

This bill makes a legislative finding and declaration that all protections, rights, and remedies available under state law, except as prohibited by federal law, are available to individuals regardless of immigration status who have applied for employment, or who are or who have been employed, in this state. The bill would further find and declare that for the purposes of enforcing state labor, employment, civil rights, and employee housing laws, a person' s immigration status is irrelevant to the issue of liability and no inquiry shall be permitted into a person's immigration status except when necessary to comply with federal immigration law.

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NLRB Forbids Regions' Ex Parte Communications With Supervisors in Organizations Represented by Counsel

By Joseph Paller*

In February 2002, the NLRB 's Division of Operations-Management issued a memorandum significantly restricting the ability of NLRB staff to communicate with current and former supervisors employed by companies and unions represented by counsel unless the organization's attorney consents. Memorandum OM 02-036, at www.nlrb.gov/ommemo/om02-36.html. According to the Memorandum, the policies announced in the memorandum may be included in the next revision of the NLRB Casehandling Manual.

The new policies are puzzling. As argued below, the memorandum is based on a fundamental misreading of Rule 4.2 of the American Bar Association's Model Rules of Professional Conduct ("Model Rules"). This is particularly unfortunate since information supplied by former supervisors and employer agents has often played a critical role in proving unlawful motive, pretext or animus. *See*, e.g., *Robbins Hardwood Flooring, Inc*., (ALJ dec., June 6, 2002) 2002 NLRB LEXIS 216, *19; *Tyson's Foods*, 311 NLRB 552, 557 (1993).

THE ABA AND CALIFORNIA RULES ON COMMUNICATIONS WITH REPRESENTED PARTIES

According to the memorandum, the NLRB's new policies are based on Rule 4.2 of the ABA's Model Rules. Forty-three states (including Tennessee in 2003), the District of Columbia and the Virgin Islands have now adopted all or a portion of the Model Rules, which were promulgated in 1983 and amended most recently in February 2002. New York, Ohio and Oregon adhere to a predecessor of the Model Rules – the ABA Model Code of Professional Responsibility ("Model Code") (1969-80). Iowa, Maine, Nebraska and Puerto Rico have not formally adopted a code of professional ethics.

Most federal courts outside California follow the Model Rules or Model Code. Characteristically, California has adopted its own rules. California's Rules of Professional Conduct are applicable in all state and federal courts in Califor nia.

Model Rule 4.2, forbids a lawyer to communicate with someone whom the lawyer knows is represented by an attorney unless the attorney has consented to the communication:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.
>
> **American Bar Association, Model Rules of Professional Conduct (2002 ed.) ("Model Rules"), p. 90.**

According to the Comments to the Model Rules, Rule 4.2 serves the vital function of "protecting a person who has chosen to be represented by a lawyer" against "possible overreaching by other lawyers" in the same case. Model Rules, Rule 4.2, Comment 1, pp. 90-91. It also prevents interference "by those lawyers with the client-lawyer relationship and the uncounselled disclosure of information relating to the representation." Id.

The comments to Model Rule 4.2 address its application to " represented organizations," including corporations and labor unions. The Rule prohibits communications with a person:

> who supervises, directs or regularly consults with the organi zation's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be im puted to the organization for purposes of civil or criminal liability.
>
> **Model Rules, Rule 4.2, Comment 7, pp. 91-92.**

California Rule 2-100 is similar to Model Rule 4.2:

> While representing a client, a member [of the State Bar of California] shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer.
>
> **California Rule 2-100(A).**

The term "party" is defined to include:

> (1) An officer, director, or managing agent of a corporation or association, and a partner or managing agent of a partnership; or
> (2) An association member or an employee of an association, corporation, or partnership, if the subject of the communication is any act or omission of such person in connection with the matter which may be binding upon or imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization.
>
> **California Rule 2-100(B)(2).**

Thus, like Model Rule 4.2, California Rule 2-100(B) forbids plaintiff's counsel from speaking to supervisory or managerial employees who are wit nesses to, or themselves victims of, employment law violations if plaintiff's counsel knows that

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NLRB Procedure and Ethics Rules

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they or their employer are represented by an attorney. An exception is made for "[c]ommunications initiated by a party seeking advice or representation from an independent lawyer of the party's choice." California Rule 2-100(C)(2).

The 2002 revision of Model Rule 4.2 and California Rule 2-100 both provide that the prohibition is not applicable if the attorney lacks actual knowl edge that the opposing party is represented by counsel. California Rule 2- 100(A); Model Rules, Model Rule 4.2, Comment 8, p. 92. In addition, the California rule does not require an attorney to give notice to corporate counsel that the attorney's investigators are conducting interviews with managerial employees in efforts to determine whether a potential suit has merit. Jorgensen v. Taco Bell Corp., 50 Cal. App. 4th 1398, 1403 (1996).

The California rule also indirectly addresses communications by union counsel with members who may be supervisors or managers. Although an effect of paragraph (B)(2) is to forbid counsel from communicating with employees whose statements may be imputed to their employer, paragraph (C)(3) of the rule exempts "[c]ommunications otherwise authorized by law" from the rule's prohibi tions. The Drafter's Notes acknowledge that one purpose in incorporating this provision is to protect the rights of labor organizations:

> Rule 2-100 is intended to control communications between a member and persons the member knows to be represented by counsel unless a statutory scheme or case law will override the rule… These statutes protect a variety of other rights such as the right of employees to organize and to engage in collective bargaining,…

Thus, in California, it would appear that union counsel is permitted to speak to all bargaining unit members, including those with authority to bind the employer, without interference by the employer.

The NLRB's Old and New Policies

The NLRB Casehandling Manual [www.nlrb.gov/chm1.html] provides procedural and operational guidance to Regional staff in the processing of representation and unfair labor practice cases. Acknowledging the importance of supervisors to investigations, the Unfair Labor Practice Proceedings portion of the manual authorizes Board agents to receive "information from a supervisor or agent of the charged party where the individual comes forward voluntarily, and where it is specifically indicated that the individual does not wish to have the charged party's counsel or representative present." Id., at § 10056.6.

The Casehandling Manual also explicitly recognized that the consent of corporate counsel is not required before communicating with former supervisors:

> It is noted, however, that former supervisors, etc., are not agents of the respondent after the supervisory relationship has been severed. Thus, the respondent's counsel does not have the right to be present when a former supervisor is interviewed. In this regard, Rule 801(d)(2)(D) of the Federal Rules of Evidence states that an admission is "a statement by the party's agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship." Id.

The NLRB now takes a different view. Under the new policy, no Board agent (whether attorney or field examiner) can communicate with a current manager or supervisor of a party or a non-party if the Region has been advised that the party or non-party is represented by an attorney, unless the attorney consents. In contrast, a Board agent can communicate freely with a manager or supervisor who is employed by a party that is not represented by legal counsel or is represented by a non-attorney.

The memorandum also requires the Region to contact Washington for guidance before interviewing a former manager or supervisor of a represented employer, or a current manager or supervisor who has come forward voluntarily and does not want his or her employer's attorney to be present.

The NLRB's Misinterpretation of Ethics Rules

The NLRB's new rules will unavoidably inhibit Board agents' investigations of unfair labor practice charges. Regional staff – whether attorney or examiner – can no longer communicate with potential witnesses who are or were supervisors without first obtaining the consent of their employer's or former employer's attorney. Realistically, some attorneys will take advantage of their rights under the memorandum to prevent any communications between the supervisor and the Region. Others will attempt to sanitize the supervisor's version of the facts before the interview is conducted. The memorandum invites these results:

> Where the Region has been advised that a party is represented by an attorney, a Board agent – whether an attorney or field examiner – must contact and obtain consent from the party's attorney before initiating contact with or interviewing a current supervisor or agent. If the party's attorney refuses to consent to the interview being conducted without his/her presence and refuses to attend, the Board agent should not proceed with the interview.

In addition, a Board agent must apply for and obtain permission from Washington before interviewing either a former supervisor, or a current supervi sor who has come forward voluntarily to give evidence.

The inhibiting effect of the new restrictions might be excusable if they were mandated by ethics rules governing the conduct of federal attorneys. As shown below, however, the policies impose limitations on investigations that are not warranted by existing law or the applicable ethics rules.

a. The Rules do not Restrict Government Lawyers. First, and most glaringly, both the ABA and California rules exclude lawyers employed by government agencies from the restrictions on ex parte communications with represented

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Mandatory Arbitration Update

By John M. True*

There have been some interesting developments in the law of mandatory arbitration recently, in the legislature as well as in the courts.

Federal Courts – Several years ago, in *Duffield v. Robertson Stephens*, a panel of the Ninth Circuit held that "employees may not be required, as a condition of employment, to waive their right to bring future Title VII claims in court." *Duffield v. Robertson Stephens & Co.* (9th Cir. 1998) 144 F.3d 1182, 1190, cert. denied, 119 S. Ct. 445 (1998). Judge Stephen Reinhardt, writing for the panel, reasoned that Title VII, as it had been recently amended by the Civil Rights Act of 1991, was a declaration of *public* rights and obligations which carried with it, among other things, a right to a jury trial. *Duffield* held straightforwardly that an employer was not free to simply slide out from under that right by requiring employees to waive it as a condition of employment.

In the intervening years – and in spite of the U.S. Supreme Court's refusal to review the case – it has become *de rigeur* to predict its demise. No other circuit has adopted its reasoning, and the Supreme Court's decision in *Circuit City Stores v. Adams* (2001) 532 U.S. 105, was widely claimed to be the final, definitive green light for compelled arbitration of statutory employment rights.

Sure enough, another panel of the Ninth Circuit has now declared that *Duffield* is not good law any longer; it is mere "fruitful error," an evolutionary aberration "full of seeds, bursting with its own corrections." *EEOC v. Luce, Forward, Hamilton & Scripps*, (9th Cir. 2002) 303 F.3d 994, 1004, fn. 5, quoting Stephen J. Gould, The Panda's Thumb, 244 (1980). *Luce Forward* involved an employee of a law firm, Donald Lagatree, who refused to sign an agreement requiring that he arbitrate employment disputes when it was proffered to him by his employer. When he was fired for his refusal, he sued, alleging that his termination had violated public policy. He was unable to persuade California courts of the correctness of his view (*see, Lagatree v. Luce Forward Hamilton & Scripps* (1999) 74 Cal. App.4th 1105), but he did convince the EEOC to take his case. That agency succeeded in obtaining relief at the District Court level, but failed in the Ninth Circuit, which held that Duffield must now be revisited in light of Circuit City. Looking again at the controversy, this panel concluded that an employer may indeed compel its employees to arbitrate claims B even Title VII claims B upon pain of discharge. So, *Duffield* is dead.

Or is it? Perhaps not. As of this writing, the Ninth Circuit on its own motion has requested briefing from the parties as to why the case should not be heard *en banc*. "Long live *Duffield*," some might say.

Meanwhile, in *Ferguson v. Countrywide Credit Industries, Inc.* (9th Cir. 2002) 298 F.3d 778, the Ninth Circuit followed *Armendariz* in holding that an employment agreement that compels arbitration of the claims an employee is most likely to bring against an employer, but exempts from arbitration the claims the employer is most likely to bring against its employees, is substantively unconscionable. Where the agreement is also procedurally unconscionable, it is unenforceable, the Court held. The unequal contract terms included the requirement that arbitration forum costs would be split between the parties (though the employer was required to pay for the first day), that discovery was limited, and that remedies available to the employer were not available to the employee. Interestingly, the panel cited with approval two California appellate court decisions, *Mercuro* and *Szetela*, discussed below.

California Courts

Pending before the California Supreme Court at the moment is *Little v. Auto Stiegler, Inc.* (2001) 92 Cal.App.4th 329, rev. granted, __ Cal.4th __, 114 Cal.Rptr.2d 612, 36 P.3d 626 (2001), a case which construed *Armendariz* to hold that a plaintiff suing for tortious demotion and termination, but alleging no statutory claims, could be compelled to share the costs of a mandatory arbitration proceeding. Review has also been granted and decision deferred pending resolution of *Little* in *Swiderski v. Milberg, Weiss, Bershad, Hynes & Lerach, LLP*, (2001) 94 Cal.App.4th 719, *rev. granted, deferred*, __ Cal.4th __, 118 Cal.Rptr.2d 1, 42 P.3d 509 (2002), which presents the same issue.

Meanwhile, in *One World Networks Integrated Technologies, Inc. v. Duitch*, ____ Cal.App.4th ____, 2002 (2nd District, Div. One, November 21, 2002), the Second District Court of Appeal has held that an employer not a party to an arbitration agreement, but in litigation with one of its former employees who is signatory to an arbitration obligation with another employer, has no standing to petition to stay arbitration. The dispute arose in litigation over a non-competition clause in an employment agreement that also contained an arbitration clause. Even though the non-signatory employer claimed that its interests would be harmed by discovery conducted in the arbitration proceeding, as a "stranger" to the arbitration agreement it was held powerless to prevent it from going forward.

In *Sanders, et al. v. Kinko's, Inc.* (2002) 99 Cal.App.4th 1106, the Fourth District Court of Appeal held that the trial court's dismissal of a petition to compel arbitration without prejudice to pending class certification proceedings was not an act pre-empted by the Federal Arbitration Act (FAA) 9 U.S.C. § 1, *et seq.* In a class action wage-hour case, plaintiffs

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Mandatory Arbitration Update

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had not opposed arbitration, but had asserted that before referring the controversy to an arbitrator the court should first resolve the class certification issue. Noting that "It is now well established that a California court may order classwide arbitration in appropriate cases," (*id*. at p. 1110, citations omitted) the Court of Appeal found nothing in the dismissal of the employer's petition that would "defeat the FAA's objectives." *Id* at p. 1112, citing *Izzi v. Mesquite Country Club* (1986) 186 Cal.App.3d 1309, 1322.

In another class action case, *Szetela v. Discover Bank* (2002) 97 Cal.App.4th 1094, the Fourth District Court of Appeal invalidated a consumer arbitration clause involving credit card holders of a nationwide bank where the arbitration provision prohibited class action proceedings. The arbitration clause was held to be void as against public policy – a "get out of jail free" card for the bank. *Id*. at p. 1101.

Finally, in *Mercuro v. Superior Court (Countrywide Securities Corporation)* (2002) 96 Cal.App.4th 167, the Second District Court of Appeal held that an employment arbitration agreement is unconscionable where: (1) the employer had made threats of termination against the employee in connection with the signing of the agreement, (2) the agreement was unfairly one-sided, and (3) the agreement could not be cured by severing the unconscionable and illegal provisions.

Legislative Enactments – A total of five of the eight bills pertaining to mandatory arbitration introduced in the California legislature were signed by the Governor last September. These include:

- Assembly Bill 2504 (Jackson) which imposes limits on and requires disclosures about the recruiting of sitting judges by arbitration service providers. Cal. Code Civ. Proc §§ 170.1, 1281.9;
- Assembly Bill 2574 (Harmon) which prohibits certain financial relationships between neutral arbitrators and ADR service providers and users of their services. Cal. Code Civ. Proc § 1281.92;
- Assembly Bill 2656 (Corbett) which requires certain disclosures of neutral arbitrators and ADR service providers. Cal. Code Civ. Proc § 1281.96;
- Assembly Bill 2915 (Wayne) which requires the waiver of filing fees for arbitration participants who cannot afford them. Cal. Code Civ. Proc § 1284.3; and
- Assembly Bill 3030 (Corbett) which ends immunity from lawsuits enjoyed by arbitration firms. Cal. Code Civ. Proc §§ 1281.84, 1287.1.

A number of other arbitration-related bills either died before reaching the Governor's desk or were vetoed. Assembly Bill 3029 (Steinberg), which would have banned one arbitration firm handling a given company's business, was vetoed. Senate Bill 1538 (Burton), which would have invalidated pre-dispute arbitration agreements as they relate to employment discrimination claims under the FEHA died in committee, as did Assembly Bill 1067 (Jackson) which would have overruled *Moncharsh*.

Significant federal legislation is also pending: in Congress, the "Preservation of Civil Rights Protections Act," HR 2282, sponsored by Representatives Kucinich (D-Ohio), Frank (D-Mass.), Markey (D-Mass.), Conyers (D-Mich.), Nadler (D-NY) and thirty-six others, would amend the FAA to clarify that contracts of employment are not intended to be covered.

Administrative Developments – As of July 1, 2002 a total of 15 "Ethics Standards for Neutral Arbitrators in Contractual Arbitration" promulgated by the California Judicial Council became effective. The heart of these is Standard 7, "Disclosure," which requires that:

> a person who is nominated or appointed as a neutral arbitrator must make a reasonable effort to inform himself or herself of any matters that could cause a person aware of the facts to reasonably entertain a doubt that the proposed neutral arbitrator would be able to be impartial and must disclose all such matters to the parties.

The balance of Standard 7 is comprised of a lengthy list of matters that must be disclosed, including "significant past, present, or currently expected"

- personal relationships or affiliations;
- service as a dispute resolution neutral;
- attorney client relationships;
- professional or financial relationships;
- relationships between the arbitrator and the dispute being arbitrated; and
- memberships in any organization that practices invidious discrimination;

Perhaps most unique is Standard 7(6), applicable to "consumer arbitrations" (which include employment disputes, other than those covered by collective bargaining agreements). In such proceedings, the arbitrator must also disclose the "nature of the relationship" between himself or herself and the "dispute resolution provider organization that referred the case to the arbitrator or that is coordinating, administering, or providing the services of the arbitrator in this case and any significant past, present, currently expected financial or professional relationship or affiliation between that dispute resolution provider organization and a party or lawyer in the arbitration." Importantly, failure to make these disclosures adequately can provide the basis a motion to vacate an award once it has been entered. ✍

Public Sector Case Notes

By Stewart Weinberg*

PUBLIC EMPLOYMENT

Damages Disallowed In Cases Involving Violation Of Constitutionally Protected Liberty Interest

Katzberg v. Regents of University of California, (2002) ___ Cal. 4th ___, (Nov. 27, 2002)

Following an investigation concerning alleged mishandling of funds in the Radiology Department of the University of California, Davis Medical Center, the University issued a press release announcing that "appropriate personnel actions had been initiated." Shortly thereafter, the Plaintiff was removed as the Chairperson of the Department, but remained a tenured faculty employee. Plaintiff sued for monetary damages alleging that he had been stigmatized by the University's actions. Summary judgment was granted to the University on the ground that although Plaintiff may be entitled to a hearing to clear his name, monetary damages were not available to remedy an asserted violation of the due process liberty interest. However, damages may be available in the absence of any other adequate remedy. In the instant case, Plaintiff had been offered a name-clearing hearing, which he declined.

In the companion case, decided the same day, *Degrassi v. Cook* (2002) DJDAR 13349, the Supreme Court held that a City Council Member could not recover damages against City officials for the alleged violation of her free speech rights under the California Constitution.

PEACE OFFICERS

Sheriff's Department Must Reinstate Deputy Who Was Denied Disability Retirement Benefits

Hanna v. Los Angeles County Sheriff's Department, (2002) 102 Cal.App.4th 887.

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A deputy sheriff received a Worker's Compensation Appeals Board award with a work restriction precluding stressful employment which stated, "could no longer be a police officer". Based on that work restriction the Department refused to reinstate her, so she applied for disability retirement. However, the Retirement Board denied her application for disability retirement because she failed to meet the burden of proof. She then demanded reinstatement to her "customary job" but the Sheriff's Department refused. She filed a petition for writ of mandate which the trial court granted and the Court of Appeal affirmed. Government Code section 31725 provides that if a disability retirement application is denied the employer may obtain judicial review but if a petition for such review is not filed or is denied "and the employer has dismissed the member for disability," the employer shall reinstate the member. The Court of Appeal held that the Department may refuse to allow the deputy to perform some of the duties of a deputy sheriff, but it must pay her as a deputy sheriff.

EFFECT OF RESIGNATION

Once an Individual Has Resigned He No Longer Has a Property Interest in a Public Job, But May Have Other Rights

Ulrich v. City and County of San Francisco, _____ Fed.3d _____ (9th Cir. 2002) (Oct. 11, 2002)

After publicly protesting layoffs among the medical staff, a doctor employed by the City and County of San Francisco received notice that he was being investigated for professional incompetence. The doctor resigned his employment, to be effective about a month later, but then learned that a resignation under such circumstances must be reported to state and federal authorities so he attempted to rescind the resignation. The City and County of San Francisco would not permit him to rescind and he sued for a violation of his property and liberty interests, as well as for defamation. The Ninth Circuit held that once his resignation had been accepted he no longer had a protectable property interest. However, as to his claim that the refusal to permit him to rescind amounted to punishment for exercising his protected First Amendment right of free speech, the Court held that he had met his burden of demonstrating that the investigation was an adverse employment action and that his expression was a matter of public concern as well as substantial and motivating factor in the decision to investigate him. Thus, since the District Court had granted summary judgment to the City and County, the matter was remanded for a trial of the factual issues.

MANDATORY USE OF PERSONAL VEHICLE

Employer May Compel Use of Personal Vehicle on County Business

Los Angeles County Association, et al. v. County of Los Angeles, (2002) 102 Cal.App.4th 1112.

After the Union and the County of Los Angeles were unable during negotiations to reach an agreement, the County unilaterally imposed its last, best and final offer, one of the terms of which included the County's right to determine which employees were required to provide a private vehicle to carry out County services. The Union unsuccessfully sought an

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injunction. The Court of Appeal affirmed, holding that the statement in *California Ass'n of Professional Employees v. County of Los Angeles*, (1977) 74 Cal.App.3d 38 to the effect that employees "may elect to use [his or her own vehicle] or to travel by public conveyance" (emphasis added) was dicta which was not essential to the decision in that case. The Charter of the County of Los Angeles did not prohibit the County from requiring the use of personal vehicles as a condition of employment nor was it otherwise proscribed by law.

TEACHERS

University May Not Discipline Professor For Violating an Order Which is Inconsistent With Collective Bargaining Agreement

Moosa v. State Personnel Board (2002)
102 Cal.App.3d 1379.

Following an adverse decision by the State Personnel Board protesting his demotion from full professor to associate professor at California State University, Chico, petitioner filed a petition for writ of mandate. The professor who had a " reputation for demanding rigorous work of students" had been ordered as a part of the collectively bargained evaluation process to submit an improvement plan to improve his teaching performance. Instead, the professor submitted a "majority report" by two out of three members of a peer review committee which determined that he was not the cause of the low enrollment in his courses. The Court of Appeal held that although the professor had willfully refused to comply with the directive to develop an improvement plan, there was nothing in the collective bargaining agreement authorizing the dean or anyone else, as part of a periodic evaluation, to direct a tenured professor to submit such a plan. Therefore, the professor could not be disciplined for refusing to obey an order which the dean had no right to make.

TEACHERS

Teacher On Compulsory Leave Must Mitigate Back-Pay

Martin v. Santa Clara Unified School District (2002)
102 Cal.App. 4th 241 (The Supreme Court recently granted review of this decision)

A teacher against whom criminal drug charges had been brought was placed on compulsory leave pursuant to Education Code Section 44940. The court had placed the teacher in a diversion program. Eventually the criminal charges were dismissed without a conviction as a result of the diversion program. Under Education Code Section 44940.5(c) if the charges against the teacher are dismissed, the teacher is to be paid his or her full compensation for the period of compulsory leave of absence upon return to service in the school district. The Court of Appeal found that a teacher in this circumstance has an affirmative duty to mitigate damages by seeking comparable employment while on compulsory leave-of-absence, and that no evidence of reasonable diligence was present in the instant case. The Court remanded the matter to the trial court to determine the appropriate amount of projected earnings to be applied in mitigation of the damages awarded.

PUBLIC EMPLOYEE RETIREMENT

Reciprocity Between Retirement Systems Applies To Employees Who Left Employment Prior To Enactment of Statute.

Maffei v. Sacramento County Employees Retirement System (2002)____ Cal.App. 4th ____; (Nov. 20, 2002)

In 1999, the California Legislature created reciprocity between various retirement systems, including the Sacramento County Employees' Retirement System (SCERS) and the State Teachers Retirement System (STRS). (Government Code § 31840.8.) Under this system, an employee who moves from one job in the public sector to another can defer retirement in the first job, and then retire from the first job and the second job simultaneously and have the retirement allowance based upon the employee's highest compensation in either job. In the instant case, the Plaintiff quit her job with the County of Sacramento in 1990, and became a teacher in the San Juan Unified School District, moving from SCERS to STRS. She did not take her retirement when she left County employment, but the SCERS informed her that because she left employment before reciprocity was established in 1999, she would not receive the benefit of Section 31840.8. The Court of Appeal affirmed the Declaratory Judgment in favor of the employee holding that this is not a retroactive application since the statute was intended to apply the law as it existed at the time the employee retires.

PEACE OFFICERS

Police Officers Entitled to Public Hearing Regarding Civilian Review Board Recommendation

Caloca v. County of San Diego (2002)
102 Cal.App. 4th 433

In an earlier case, *Caloca v. County of San Diego* (1999) 72 Cal.App. 4th 1209 (Caloca I), the Court of Appeal held that three Sheriff's Deputies were entitled to administrative review of misconduct findings made by the Civilian Law Enforcement Review Board. As a result, the San Diego Civil Service Commission adopted procedures which placed the burden of establishing that misconduct findings were erroneous upon the Deputies, and permitted the Commission to close portions of its hearings to the public. In the appeal from a judgment on a petition for a writ, the Court of Appeal held that a proceeding which was designed to administratively review findings of misconduct by a Civilian Review Board must be a de novo hearing and thus the peace officers should not have the burden of refuting the Civilian Review Board's misconduct findings. Furthermore, it was held that such a hearing could not be closed if the peace officer objected.

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NLRA Case Notes

By Emma Leheny*

Board Precedent Does Not Support Conclusion that, Absent Union Security, Dues-Checkoff Provision Expires with Contract

Local Joint Exec. Bd. of Las Vegas v. NLRB, 309 F. 3d 578 (9th Cir. October 28, 2002).

In this case, the Ninth Circuit examined an exception to the rule that an employer violates its duty to bargain in good faith if it imposes unilateral changes in mandatory subjects of bargaining before bargaining to agreement or impasse. In *Bethlehem Steel*, 136 NLRB No. 1502 (1962), the Board held that an employer had not committed an unfair labor practice when, after the expiration of its agreement with the union, it ceased giving effect to union security and dues-checkoff provisions. Here, the Board relied on *Bethlehem Steel* and its progeny to conclude that, even absent a union security clause, a dues checkoff provision expires with the contract. The Ninth Circuit held that this conclusion was unsupported by Board precedent.

A statutory basis exists for excluding union security from the unilateral change doctrine. Section 8(a)(3) of the Act specifically prohibits union security arrangements in the absence of an enforceable contract. Judge Paez, writing for a unanimous panel, could not discern a justification for excluding the dues-check-off provision from the unilateral change doctrine where it is not linked to union security and the limitation imposed by Section 8(a)(3).

In *Bethlehem Steel*, the Third Circuit had enforced the Board's order because it found that the dues-checkoff provision merely implemented union security, and thus expired with the contract. *Industrial Union of Marine & Shipbuilding Workers v. NLRB*, 320 F. 2d 615, 619 (3rd Cir. 1963). Because the Ninth Circuit could not discern the Board's rationale for extending the holding of *Bethlehem Steel* to apply where the dues-check-off provision stands alone, it remanded the case to the Board to either change its conclusion or provide an explanation for it.

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Rules Barring "Disloyal" Speech and Conduct by Employees Do Not Violate the Act

Tradesmen International, 338 NLRB No. 49 (October 31, 2002).

The Board reversed and dismissed an administrative law judge's determination that an employer violated Section 8(a)(1) by prohibiting certain speech and conduct by employees. Specifically, the employer barred employees from (1) acting in a "disloyal, disruptive, competitive, or damaging" manner, (2) representing the Company negatively, and (3) making "statements which are slanderous or detrimental" to the Company or its employees.

The Board referred to the standard set forth in Lafayette Park Hotel, 326 NLRB 824, 834 (1998), stating that "the appropriate inquiry is whether the rules would reasonably tend to chill employees in the exercise of their Section 7 rights." Under this standard, the Board concluded that the employer's rules did not violate the Act.

Dissenting on this issue, Member Liebman found that the rules would tend to chill employees in the exercise of their Section 7 rights. In particular, she wrote that the rule prohibiting "slanderous or detrimental" statements fails to define the scope of permissible conduct and would therefore tend to cause employees to refrain from engaging in protected activities rather than risk being disciplined.

Shareholder Taxi Drivers Are Not Covered Employees

Citywide Corporate Transportation, Inc., 338 NLRB No. 45 (October 22, 2002).

The Board adopted the administrative law judge's recommended order dismissing the complaint, which alleged that the employer, a limousine service, violated Section 8(a)(1) of the Act through surveillance, interrogation and threats of reprisals, and Section 8(a)(1) and (3) by denying employment opportunities to a driver who had engaged in union organizing activities.

The employer argued that the driver was not covered by Section 7 of the Act because the employer is owned by the drivers and has no drivers who are solely employees. The judge found that the drivers work for themselves, and have the authority to set corporate policy. On this basis, the judge concluded that the drivers are not employees protected by the Act.

Concurring, Member Liebman wrote separately "to suggest that the Board should soon reexamine its approach, which may have evolved inadvertently, without careful consideration of all its current ramifications." She stated that although the Board's current law makes this case seem straightforward, the Board should reconsider the law itself in light of changing workplace arrangements.

Sign-in Rule at Airport Work Site Does Not Unlawfully Limit Union Access

Peck/Jones Construction Corp., 338 NLRB No. 4 (September 20, 2002).

The Board affirmed the administrative law judge's dismissal of a complaint alleging that the employer violated

NLRA Case Notes

Continued from Previous Page

Section 8(a)(1) of the Act when it denied two union business agents access to its construction site at the Los Angeles International Airport.

The Board agreed with the judge that the business agents failed to follow the employer's reasonable and nondiscriminatory rule that visitors must sign in before entering a secured area. On that basis, the Board concluded, the agents are not entitled to enforce their contractual right to access. The Board also pointed out that the employer's sign-in rule was consistent with the access provisions of the union's collective-bargaining agreement with a subcontractor of the employer. The Board did not decide whether the employer's requirement that the union agents be escorted onto the work site is a reasonable access rule.

Member Cowen concurred, adding that this decision, which involves airport security prior to the events of September 11, 2001, "should not be read as expressing any view about how the Board will evaluate union access questions arising under the Federally mandated heightened security restrictions now in place at airports throughout the nation."

Non-Profit Foundation Not Exempt as Political Sub-Division of Public University

Research Foundation of the City Univ. of New York, 337 NLRB No. 152 (July 31, 2002).

The Board reversed the Regional Director and found that the foundation, a non-profit educational corporation, is an employer, not a political sub-division under Section 2(2) of the Act and reinstated a representation petition filed by the union, UAW Local 2110. The employer administers grants and contracts awarded by public and private entities to the City University of New York (CUNY), a public university with multiple campuses. The petitioned-for employees provide outreach services to welfare recipients and other low-income individuals.

The parties stipulated that CUNY itself is exempt from the Board's jurisdiction under Section 2(2). As to the foundation, the Board applied the test set forth in *NLRB v. Natural Gas Utility Dist. of Hawkins County*, 402 U.S. 600, 604-605 (1971), under which a finding of political sub-division status requires proof that an employer is either: (1) created directly by the state; or (2) is administered by individuals responsible to public officials or the electorate. It held that the evidence failed to support a finding that the foundation is an exempt political sub-division under either part of the test. The Board also found, contrary to the Regional Director, that the employer and CUNY do not constitute a single employer. The Board did affirm the Regional Director's finding that employees in all outreach programs on the Bronx Community College campus of CUNY constitute an appropriate unit.

Alter Ego Employers Ordered to Bargain with Union that Gained Majority Support through Showing of Authorization Cards

Michael's Painting, Inc., and Painting L.A., Inc., 337 NLRB No. 140 (July 26, 2002).

The Board affirmed the administrative law judge's finding that the employer violated Section 8(a)(1) and (3) of the Act by interrogating employees, interfering with lawful picketing activity, threatening to close its business, and by discharging employees and conditioning the release of their paychecks upon the presentation of immigration related documents. The Board also affirmed the judge's finding that Michael's Painting and Painting L.A. constituted alter ego companies, and that the employer's purpose in establishing Painting L.A. was in part to rid itself of employees who had picketed Michael's Painting. Despite the employer's conduct, the union, Painters District Council 36, gained the support of a majority of the employees based on a showing of authorization cards.

The Board, in addition to the usual remedies for the violations found, ordered the employer to bargain with the union, consistent with the principles of *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). Concluding that the conduct of a fair election in the future would be unlikely, the Board cited *Charlotte Amphitheater Corp. v. NLRB*, 82 F. 3d 1074, 1078 (D.C. Cir. 1996): "employees' wishes are better gauged by an old card majority than by a new election." ✍

Mediation the Northern District Way

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ENDNOTES

1. At its ADR website – www.adr.cand.uscourts.gov — the District Court notes that cases most amenable to mediation are those where the parties desire a creative solution, the parties have a continuing relationship, either business or personal, multiple parties are involved, equitable relief is sought, or communication has broken down. For those cases that are at impasse primarily or solely because the dollar settlement value is in dispute an Early Neutral Evaluation may be a more fruitful process.
2. A case that enters the Northern District is either treated as an ADR Multi-Option Program Case (most civil cases) and is presumptively required to participate in ADR (ADR Local Rule 3), or counsel may move the Court, under ADR L.R. 7, to participate in an ADR process, or the Court may make such a referral.
3. Most mediators by practice will not disclose anything revealed in caucus unless expressly authorized to do so by the party. Northern District Mediators are obligated under Local Rule 6-10 to keep caucus communications confidential unless authorized to do otherwise. At the mediation the parties may also be asked to sign a confidentiality agreement with regard to the entire mediation process (Local Rule 6-11).

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EEO Case Notes

By Teresa R. Tracy*

Ninth Circuit Considers Attorneys' Fees Issues in Class Actions

***Staton v. Boeing Company*, __F.3d__ (9th Cir. 11/26/02)**

The parties to a class action may not include in a settlement agreement an amount of attorneys' fees measured as a percentage of an actual or putative common fund created for the benefit of the class. Instead, in order to obtain fees justified on a common fund basis, the class's lawyers must ordinarily petition the court for an award of fees, separate from and subsequent to the settlement. Further, the parties may not include an estimated value of injunctive relief in the amount of an actual or putative common fund for purposes of determining an award of attorneys' fees. Lastly, the record must provide sufficient justification either for a large differential in the amounts of damage awards to class representatives and other identified class members, as well as payment of damages to a nonmember of the class.

Court Considers a Variety of Issues in Failure-to-Promote and Retaliation Case

***Lyons v. England*, 307 F.3d 1092 (9th Cir. 2002)**

In this Title VII case against the Navy, the court held that the employees' pre-limitations period claims insofar as they alleged discrete acts of discrimination and retaliation were time-barred based on the U.S. Supreme Court's decision in AMTRAK v. Morgan, 153 L.Ed.2d 106 (2002). However, the plaintiffs were permitted to offer evidence of pre-limitations discriminatory acts in the prosecution of their timely claims. The court also held that the plaintiffs had exhausted their administrative remedies after broadly construing the scope of their administrative complaint. The court found that the plaintiffs did not have to prove that they applied for an available position when making a failure-to-promote claim against the employer if the trier of fact could reasonably infer that promotions were not awarded on a competitive basis. Further, where the employer has not published the qualifications for positions that were awarded without a competitive application process, it would be unreasonable to require plaintiffs to present direct evidence of the actual job qualifications as part of his prima facie case. Instead, circumstantial evidence or (in the context of summary judgment) the plaintiffs' self-assessment of their performance may be sufficient to establish a prima facie case. The fact that a particular position was filled with a member of the plaintiffs' protected class is more properly considered as evidence produced by the employer to rebut an inference of discrimination rather than as evidence essential to the plaintiffs' prima facie case. However, the court did held that a performance evaluation that was the equivalent of "average" or "mediocre" did not, without more, satisfy the requirements of a prima facie case of retaliation because it was not sufficient to establish an acverse employment action.

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Plaintiffs Stated Claim that Citizenship Requirement for Airport Screener Violated Constitution

***Gebin v. Mineta*, ___F. Supp.3rd__ (C.D. Cal. 11/13/02)**

The court considered that effect of the Aviation and Transportation Security Act. The issue was whether Congress could constitutionally require United States citizenship as a pre-condition to employment as a federal airport security screener. The court noted that the general rule was government action must meet "strict scrutiny" to constitutionally justify the exclusion of aliens. However, it went on to consider two exceptions to this general rule, i.e., (1) the governmental function exception, and (2) the special deference given to the political branches of the federal government in the area of immigration and naturalization. Here, the court held that the government function exception did not apply because the airport screeners were not vested with discretionary authority nor did they perform a fundamental obligation of government to its constituency. The second exception did not apply because the applicants were United States nationals. Thus, at the pleading stage of this case, the court could not conclude that the categorical exclusion of all non-citizens from employment was the least restrictive means to further the governmental interest in improving aviation security. Accordingly, the complaint stated a claim.

Broad Workers' Compensation Release Bars Sexual Harassment Suit under FEHA

***Kohler v. Interstate Brands Corporation*,___ Cal. App. 4th ____ (11/25/02)**

In this action for gender-based harassment under FEHA, the court affirmed a summary judgment in favor of the employer on the ground that the plaintiff had released the employer from liability for the FEHA claim by signing a standard workers' compensation compromise and release agreement which released "all claims and causes of action" against the employer.

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Employment Law Case Notes

By Anthony J. Oncidi*

Employee Who Suffered Psychiatric Injury From Workplace Investigation Is Not Entitled to Workers' Comp Benefits

***Northrop Grumman Corp. v. WCAB*, ___ Cal. App. 4th ___, 127 Cal. Rptr. 2d 285 (2002)**

Robert C. Graves filed a workers' compensation claim for psychiatric injuries he allegedly sustained following an investigation into his alleged racial discrimination against a subordinate employee whom he supervised at Northrop Grumman. The workers' compensation judge (and the WCAB) found that the psychiatric injury caused Graves permanent disability of 20 percent, that further medical treatment was required and that the injury had resulted from a false accusation of racial prejudice. The Court of Appeal reversed the judgment, holding that pursuant to Labor Code § 3208.3(h), no compensation shall be paid by an employer for a psychiatric injury that was substantially caused by a "lawful, nondiscriminatory, good faith personnel action." The Court found the judge's decision that the employer had not acted in good faith was not supported by substantial evidence.

Attorney's Fees May Be Assessed Against Employee Who Fails To Improve On Labor Commissioner's Award

***Smith v. Rae-Venter Law Group*, ___ Cal. 4th ___, 2002 WL 31681441 (Dec. 2, 2002)**

Following Timothy L. Smith's resignation as an associate with the Rae-Venter Law Group (RVLG), he filed a claim with the Labor Commissioner and obtained an award for unpaid vacation pay, some miscellaneous deductions and expense reimbursements and statutory prejudgment interest. Smith also sought but failed to recover an unpaid bonus and waiting-time penalties. Smith appealed the Labor Commissioner's award to the superior court where he did no better than he had before the Labor Commissioner except that he was awarded $230 more in prejudgment interest on his non-wage claims. Smith unsuccessfully appealed the superior court's failure to award him waiting-time penalties, and RVLG successfully appealed the court's denial of its request for attorney's fees and costs under Labor Code § 98.2(c) on the ground that Smith had been "unsuccessful in the appeal" from the Labor Commissioner's ruling. The Supreme Court affirmed the Court of Appeal's judgment denying Smith waiting-time penalties on the ground that there was a good-faith dispute as to whether Smith was owed unpaid compensation. However, the Supreme Court reversed the judgment entered in favor of RVLG. The Court held while the Court of Appeal was correct in determining that Smith had not been successful in his appeal because he had failed to improve on the Labor Commissioner's award, this rule would be applied only prospectively because Smith had reasonably relied on prior Court of Appeal precedent that was disapproved in this opinion.

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The Continued Use Or Disclosure Of A Trade Secret May Be Part Of A "Continuing Misappropriation"

***Cadence Design Sys. v. Avant! Corp.*, ___ Cal. 4th ___, 127 Cal. Rptr. 2d 169 (2002)**

In this case, the California Supreme Court answered the following question of law certified to it from the United States Court of Appeals for the Ninth Circuit: Under the California Uniform Trade Secrets Act (UTSA), when does a claim for trade secret infringement arise: only once, when the initial misappropriation occurs, or with each subsequent misuse of the trade secret? In 1994, the parties negotiated a release of Cadence's trade secret misappropriation claims (including any unknown claims) that arose against Avant! when a Cadence vice president joined Avant! In 1995, one of Cadence's engineers discovered a "bug" in Avant!'s software that was similar to one that he had inadvertently created several years before while writing source code for Cadence. In December 1995, Cadence sued Avant! for theft of its copyrighted and trade secret source code, arguing that the 1994 release agreement did not bar any claims for misappropriation that occurred after the date of the release. Avant! argued that the release barred all such claims, including those based on continuing or future misuse of trade secrets that were stolen prior to the date of the release. The Supreme Court narrowly answered the question and held that "the UTSA views a continuing misappropriation of a trade secret of one party by another as a single claim, …and each subsequent use or disclosure of the secret augments the initial claim rather than arises as a separate claim."

ERISA Preempts Certain Claims Asserted By Deceased Employee's Estate Against Employer

***Bui v. AT&T*, 310 F.3d 1143 (9th Cir. 2002)**

Nga Bui brought this action on behalf of her deceased husband's estate against various parties, including his former employers, AT&T and Lucent Technologies. Bui's husband, Hung M. Duong, died at Erfan Hospital in Jeddah, Saudi Arabia, after undergoing two unsuccessful operations and suffering two myocardial infarctions. In the week before his death, Duong had to decide whether to remain in Saudi Arabia for surgery or leave the country to seek treatment. The Ninth

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Employment Law Case Notes

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Circuit affirmed dismissal of a negligence claim against AT&T (which had been Duong's employer before AT&T spun off Lucent) on the ground that ERISA preempted claims arising from the selection of SOS, a company that provided medical advice and evacuation services to AT&T and Lucent employees. Similarly, the Court affirmed dismissal on preemption grounds of Bui's claims against Lucent for breach of contract and negligent retention of SOS as a service provider. However, the Court held that ERISA did not preempt Bui's claims against Lucent for failing to inform Duong that his passport could be returned to him quickly in the event of an emergency, for negligent medical advice and for delay in responding to Duong.

Employee Permitted To Proceed With Breach Of Contract Action Involving Stock Options

***Alexander v. Codemasters Group Ltd.*, ___ Cal. App. 4th ___, 127 Cal. Rptr. 2d 145 (2002)**

Craig Alexander alleged breach of contract against Codemasters (a United Kingdom-based computer game company) for its failure to provide Alexander (a former executive with the company) with options to purchase 35,000 shares of Codemasters' stock at an exercise price of $3.25 per share. In its successful motion for summary judgment, Codemasters asserted that the purported offer to grant Alexander a $50,000 performance bonus and stock options was too uncertain and indefinite to be enforceable. The Court of Appeal reversed the judgment, holding that "the existence of an agreement with respect to the conditions for vesting, if any, to be imposed on Alexander's stock options involves factual questions that cannot be determined as a matter of law because of the conflicting inferences that may be drawn from the words and acts of the parties." The Court affirmed dismissal of Alexander's claim regarding the performance bonus.

Fraud Claims Relating to Employee Stock Options Were Preempted By Federal Law

***Falkowski v. Imation Corp.*, 309 F.3d 1123 (9th Cir. 2002)**

This class action litigation arose from a merger in which Imation Corporation, a publicly traded company, acquired Cemax-Icon, a closely held company in the medical information management business. A year after the merger, Imation sold the Cemax subsidiary to Eastman Kodak Company. The plaintiffs are a group of former Imation employees who alleged breach of contract and fraud in connection with their employee stock options. The employees claim that Imation fraudulently induced them to remain with Cemax by misrepresenting the value of Imation stock and options. Although the employees filed suit in California state court, Imation removed the action to federal court on the ground that the fraud claims were completely preempted by the Securities Litigation Uniform Standards Act of 1998. The Ninth Circuit held that Imation's removal of the action to federal court was proper because "representations about the value of the stock and the terms on which the plaintiffs will be able to purchase the stock are properly subject to uniform federal standards." However, the Court reversed the dismissal of the breach of contract claims, given the ambiguity of the contract language about whether the transfer of the employees to Kodak constituted a termination of their "continuous status as employees." Finally, the Court affirmed dismissal of the alleged California Labor Code violations because "options are not wages," and of the federal securities act claims because of a lack of specificity.

Employer Was Not Vicariously Liable For Employee's Sexual Misconduct

***Doe 1 v. City of Murrieta*, 102 Cal. App. 4th 899 (2002)**

In this case, a Murrieta police officer sexually abused two 16-year-old girls who were participants in the Murrieta Police Department's Explorer Program. The minors alleged that the City of Murrieta was vicariously liable for the police officer's sexual misconduct. The trial court sustained the city's demurrer without leave to amend to the vicarious liability claims on the ground that the officer had not been acting within the course and scope of his employment when he sexually abused the minors. The Court of Appeal affirmed the trial court on this point and also affirmed summary adjudication of the minors' breach of contract claim because it had not been raised in their administrative government claim. The Court reversed the summary adjudication of the negligent supervision claim since there were material triable issues of fact as to whether the city knew or should have known of the officer's misconduct.

Subcontractor Could Not Recover On Quantum Meruit Theory After Admitting Existence Of Contract

***Valerio v. Andrew Youngquist Constr.*, ___ Cal. App. 4th ___, (Nov. 27, 2002)**

Andrew Youngquist Construction (a general contractor doing business as Birtcher Construction Services) solicited bids from subcontractors to build the Brenden Theater complex in Vacaville. Birtcher awarded Valerio the painting subcontract on the condition that he submit a performance bond. Valerio began working on the project even though he had not received an executed contract and despite his failure to submit a performance bond. Eventually, Birtcher had to bring in additional painters to supplement Valerio's crew. Valerio never provided a performance bond nor did he receive an executed contract or payment from Birtcher. Valerio sued Birtcher for breach of contract and quantum meruit (seeking, in the alternative, the value of the services he had performed). The trial court found there to be no written contract between the parties despite Valerio's judicial admissions regarding the existence of same. The Court of Appeal reversed the judgment, holding that Valerio was bound by his judicial admissions that a contract existed between the parties.

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are formally entitled "Federal Prosecution of Corporations,"[13] but are often referred to simply as the "Holder Memo." Corporate defense counsel should structure much of the investigation and their advice to fit factors identified therein.

A number of the factors identified in the Holder Memo are by definition beyond the control of the corporation by the time defense counsel gets involved (e.g., the nature and seriousness of the offense). However, a few critical factors that guide U.S. Attorneys in deciding whether to indict concern the actions of the corporation after learning of the wrongdoing. For these factors, defense counsel may have a role in defining whether and to what extent the corporation fits the factor.

1. "The corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of the corporate attorney-client and work product privileges"

This is perhaps the most controversial because, as a policy of the Department of Justice, it systemically erodes the attorney-client privilege and work product protection, to the detriment of the adversarial process.[14] It does, however, remain the policy. Many corporate clients would thus best be served through an approach involving cooperation. It is imperative that counsel recognize that in the course of providing cooperation, the issue of waiving the privilege might arise.

2. "The existence and adequacy of the corporation's compliance program"

If a government investigation has begun, it is too late for this. However, if you are reading this article and you work for a corporation without a compliance program, then it is time, right now, to set one up. A compliance program, if effective, has numerous benefits. It might prevent the violation. It might allow the corporation to self-report, something that under the federal Sentencing Guidelines can have a tremendous effect on any eventual sentence (although something again that should be ground for controversy and consideration as a policy matter). It might convince the prosecutor not to indict. It might decrease any sentence if indictment and conviction cannot be avoided.

However, to benefit the corporation, any compliance program must be effective. The Sentencing Guidelines refer to this as an "effective program to prevent and detect violations of law." Numerous law firms and companies specialize in developing such programs.

3. "The corporation's remedial actions, including any efforts to implement an effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, to pay restitution, and to cooperate with the relevant government agencies"

If the compliance program was not in place when the violation occurred, one should be implemented at once. Creating a program after the fact can evidence remedial action. Furthermore, in no case should a corporation be indicted and arrive at sentencing without having implemented such a program. The Sentencing Guidelines expressly provide that absence of such a program at the time of sentencing actually may be grounds for placing the corporation on probation.

4. "Collateral consequences, including disproportionate harm to shareholders and employees not proven personally culpable"

The defense attorney cannot actually affect this factor, but she can emphasize it. The corporation is a legal fiction, but it exists for the benefit of real persons. There are employees, investors, shareholders and others for whom the continued existence of the corporation is vital. And, even if the investigation revealed that corporate agents committed criminal acts for the purported benefit of the corporation, indicting the corporation is still likely to harm a lot of innocent people with an interest in the continued viability and financial well-being of the corporation.

5. "The adequacy of non-criminal remedies, such as civil or regulatory enforcement actions"

Many criminal investigations of corporations will be accompanied by a parallel civil action. The outcome of the civil action may have a dramatic impact upon the resolution of the criminal action. Criminal counsel should keep fully abreast of the civil developments. Although a corporation does not have a Fifth Amendment privilege against self-incrimination, the individuals who allegedly acted on behalf of the corporation do – waiver of the privilege in the civil litigation can severely hinder potential criminal defenses, while failure to waive the privilege in the civil litigation will result in an adverse inference. This Hobson's Choice can be the basis of a motion to stay the civil litigation. On the other hand, discovery in the civil action may benefit the defense of a parallel criminal action. Finally, a settlement in the civil matter that constitutes full restitution may be an effective bargaining tool in the criminal matter.

CONCLUSION

Taking your corporate client through a criminal investigation is a task fraught with struggles and dilemmas ethical, practical and legal. Continually working for the interest of the corporation, while operating through the acts of those with their own interests to guard, is a challenge. Matters will rarely be black and white, and what is black to the corporation may be white to the people who run the corporation. Through this mire it is the corporation lawyer's job to provide counsel that maximizes the chance that the corporation will survive to do business another day.

ENDNOTES

1. *See* Exec. Order: Establishment of the Corporate Fraud Task Force, (July 9, 2002), at 2002 WL 1461844.

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Criminal Investigation

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2. *See*, *e.g.*, John R. Wilke, "President Praises Work Done By Business-Crime Task Force," in The Wall Street Journal, Sept. 27, 2002.
3. This article was drafted primarily with an eye toward the representation of corporate clients. However, many of the principles and issues addressed herein would apply equally to the representation other organizational clients, such as labor unions or ERISA plans.
4. Likewise, the union's lawyer represents the union itself, and the ERISA plan's lawyer represents the ERISA plan itself.
5. *New York Central and H.R. Co. v. United States*, 212 U.S. 481, 495 (1909).
6. "The actus reus element of a crime is the 'wrongful deed that comprises the physical components of a crime and that generally must be coupled with mens rea to establish criminal liability.'" *United States v. Gumbs*, 283 F.3d 128, 132 n.3 (3d Cir. 2002)(quoting Black's Law Dictionary 37 (7th ed. 1999)). Or, as Justice Jackson more colorfully described it, crime generally requires the "concurrence of an evil-meaning mind with an evil-doing hand." *Morrisette v. United States*, 342 U.S. 246, 250 (1953).
7. In-house counsel's dual standing as a corporate employee and as an officer of the court gives rise to formidable ethical issues. For a helpful introduction to these issues, see John H. McGuckin Jr., "The Ethical Dilemma of the In-house Counsel," in Los Angeles Lawyer, March 2002, at 31.
8. Henry T.C. Hu, "New Financial Products, The Modern Process of Financial Innovation, and the Puzzle of Shareholder Welfare," 69 Tex. L. Rev. 1273, 1278 (1991).
9. *Skarbrevik v. Cohen, England & Whitfield*, 231 Cal. App. 3d 692, 703 (1991).
10. A corporation has "no soul to be damned, and no body to be kicked." – Baron Thurlow, quoted in Rakoff, Blumkin & Sauber, Corporate Sentencing Guidelines § 1.02.
11. As a practical matter, criminal counsel is often already involved by the time the special committee is created. Indeed, criminal counsel will generally have the expertise required to create a committee that can best benefit the corporation. In these cases, it may be more formally correct to describe outside counsel as having been retained by the corporation and having a duty to report to the special committee.
12. Memorandum from Eric Holder Jr., Deputy Attorney General, to All Heads of Department Components and U.S. Attorneys (June 16, 1999), available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm00161.htm.
13. U.S. Attorneys Manual, tit. 9, Criminal Resource Manual, art. 162, "Federal Prosecution of Corporations," (2000), (the "Holder Memo") available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm00162.htm.
14. *See* e.g. American College of Trial Lawyers, "The Erosion of the Attorney-Client Privilege and Work Product Doctrine in Federal Criminal Investigations," March 2002, available at http://www.actl.com/PDFs/Erosion.pdf.

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Public Sector Case Notes

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PEACE OFFICERS

Civil Service Commission Did Not Have Jurisdiction Over Hearings for Denial of Promotion

Hunter v. Los Angeles County Civil Service Commission (2002) 102 Cal.App. 4th 191

Under the Peace Officer Bill of Rights (Government Code Section 3304(b)) a Peace Officer is entitled to appeal a denial of promotion on grounds other than merit by an administrative appeal. In the instant case, a trial court had earlier granted a Writ of Mandate directing the Civil Service Commission of the County of Los Angeles to hear promotional appeals. The Appellate Court concluded that in the absence of authority in the Charter to hear such appeals, the Commission could not be compelled to do so. The Court also held that the case of *Caloca. v. County of San Diego* (1999) 72 Cal.App. 4th 1209 (Caloca I) [See above] was not authority to the contrary since the issue had not been raised in that case.

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EEO Case Notes

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Good Faith Investigation Into Discrimination Complaint Did Not Support Workers' Compensation Claim

***Northrop Grumman Corp. v. Workers' Compensation Appeals Board*, ___ Cal.App.4th ___ (11/2102)**

The employee claimed compensable industrial injury because of an investigation conducted in bad faith by his employer into racial discrimination allegations. The court noted that once a claim of discrimination is made by a co-worker that a supervisor has engaged in racial discrimination against a subordinate, the employer has a legal obligation to investigate the claim. The fact that the investigation was unable to substantiate the claim did not remove it from the realm of good faith employer personnel actions that will shield an employer from workers' compensation liability.

No Employer Liability Under FEHA for Harassment by Non-Employee

***Salazar v. Diversified Paratransit*, Inc., 103 Cal.App. 4th 131 (2002)**

In this case, the court held that FEHA does not create employer liability when a non-employee client or customer sexually harasses an employee. The court left it to the Legislature to address this issue. However, the court noted that the employee could bring a civil action for both tort and injunctive relief, as well as a possible claim for sexual battery under certain situations. ✍

Legislative Update

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LEGISLATION VETOED BY THE GOVERNOR IN 2002

SB 1538 (Burton) Arbitration.

This bill would have banned pre-dispute employment agreements to arbitrate claims brought under the Fair Employment and Housing Act (FEHA), such as claims for discrimination, retaliation and harassment. It would have also established that it is an unlawful employment practice to require an employee to waive rights and procedures established by FEHA, or to take any adverse employment action against any person in retaliation for refusing to waive rights and procedures established by FEHA. The bill also provided that the employer has the burden of proving that any waiver or arbitration agreement was knowing, voluntary, and was a condition of employment.

AB 1309 (Goldberg) Reporting requirements.

This law would have made it an unlawful practice for employers regularly employing 100 or more employees, labor organizations with 100 or more members, and some defined apprenticeship programs, to fail to file with the department a report showing, by gender, ethnicity, and job classification, the composition of its employees, membership, and participating apprentices.

AB 2989 (Committee On Labor and Employment). Severance Pay.

This bill would have provided that all employees, employed at least 36 months by an employer, are entitled to a mandatory severance pay equal to one week's pay for each 12 months of service at the time an employer relocates or terminates a "covered establishment." The term "covered establishment" was defined as any industrial or commercial facility or part thereof that employs, or has employed at any time in the preceding 12-month period, 100 or more persons, and which provides severance benefits or bonuses to some exempt employees in amount greater than the benefits offered to non-exempt employees under this law. An affected employee, or alternatively the Labor Commissioner, would have been entitled to bring a claim in court against the employer for unpaid severance pay.

AB 2990 (Committee on Labor and Employment) Retaliation Presumption.

This bill would have created a rebuttable presumption of unlawful retaliation where an employer terminates, demotes, suspends, or reduces the pay or hours of an employee within 90 days after the employee has exercised any enumerated rights under the Labor Code. This bill would have provided employees near immunity from termination or other adverse employment action after having filed a claim for unpaid wages or other similar claims with the Labor Commissioner. According to Legislative staff, the bill, arguably, would have also given the Labor Commissioner concurrent jurisdiction with Worker's Compensation Appeals Board regarding workers' compensation discrimination complaints [Labor Code Section 132a]. The Legislative Counsel opinion stated that a court would interpret the amendment to Labor Code § 98.6 to address only violations of that section [and, therefore exclude Section 132a].

AB 2987 (Committee on Labor and Employment) Penalties for Wage Violations.

This bill would have increased various civil penalties for a litany of labor law violations, including failure to designate payday; non-payment of wages semi-monthly; non-payment of wages to employees paid on weekly basis; failure to pay commissions; non-payment to managers and executives on monthly basis; for boarded or lodged agricultural employees and domestic workers, failure to designate payday, and non-payment of wages; failure to pay farm workers at least semi-monthly; equal pay violations based on gender; withholding of wage payment; failure to pay minimum wage; and many other similar violations of the wage and hour laws.

AB 2752 (Alquist) Discrimination against injured workers.

This bill would have added several protections under Labor Code § 6310 et seq. for employees against retaliation for making complaints about workplace safety. The bill stated that an employee may not be subjected to adverse employment action if the employer has knowledge that the employee made known his intent to file an oral or written complaint concerning workplace safety and that an employee must have a reasonable belief, rather than a "good faith" belief that particular work is dangerous.

AB 2845 (Goldberg). Safety.

Existing law requires the Occupational Safety and Health Standards Board to, among other things, adopt ergonomic standards designed to reduce repetitive motion injuries in the workplace. Existing law required adoption of these standards on or before July 1, 1995. This bill would require the board to revise those standards on or before July 1, 2003.

PUBLIC SECTOR LEGISLATION

By Martin Fassler, Managing Editor

TRIAL COURT INTERPRETERS

SB 371 (Escutia)

This is the state's first employment and labor relations law for state trial court interpreters, codified at Government Code section 71800 et. seq. It provides for employee status and collective bargaining rights for trial court interpreters, after a two year transitional period, and with a series of exceptions. Among the exceptions: Solano County and Ventura County, where court interpreters are already court employees and are covered by the employee and labor relations law passed in 2001.

Another exception allows continued use of interpreters as independent contractors for those long term interpreters who are either age sixty or have age and experience together adding up to more than 70; and continued employment of independent contractors in a given circumstance if there are not enough

interpreter-employees – in the particular language pair - available to a particular court. The law allows courts to hire either full-time or part-time interpreters, and there may be cross-assignment (from one court to another).

The law creates four regional bargaining units and court interpreter employees relations committee, generally following Court of Appeal lines (all the trial courts in the 1st and 6th Districts, except for Solano County in one region; trial courts in the 3rd and 5th Districts in another region; trial courts in the 4th District in a third region; and a region consisting of trial courts in Los Angeles, Santa Barbara and San Luis Obispo County).

Rules for the creation of regional management bodies are to be adopted by the Judicial Council. The regional bodies will create their own labor relations rules – in this way similar to local agencies in Meyers-Milias Brown jurisdiction – but the new law is specific about what must be included, including recognition of a union by either a 50 per-cent-plus-one card check, or a 30 per cent showing of interest to trigger an election.

Some disputes are subject to arbitration, others to writ proceedings.

PUBLIC SAFETY OFFICERS –

SB 1516 – (Romero)

Current law allows a court to issue an injunction to prevent a public agency from denying rights to a peace officer that are protected under the Public Safety Officer's Procedural Bill of Rights (Government Code section 3300 et. seq.)

The new law provides that if that is done maliciously with the intent to injure the public safety officer, then the court may order a civil penalty of $25,000 plus actual damages if proven, plus attorneys' fees.

If an action is filed in bad faith, or is frivolous or is filed for an improper purpose, the court may order sanctions against a party, an attorney or both, including attorneys fees incurred by the public agency.

AB 2908 – Amending Meyers-Milias-Brown Act

This bill creates a judicial review procedure for an order issued by PERB in MMB cases: an extraordinary writ to the Court of Appeal (the same procedure that is available with respect to parties seeking judicial review of PERB orders involving school districts or the other employers subject to PERB jurisdiction). This appeal procedure was overlooked in the legislation enacted in the year 2000 that brought MMB employers and unions under PERB jurisdiction.

Second, the bill provides, "The board shall not find it an unfair practice for an employee organization to violate a rule or regulation adopted by a public agency if that rule or regulation itself is itself in violation of this chapter." Thus PERB has the responsibility to determine if a local rule is a reasonable rule or regulation.

AB 1889 (Horton) requires cities, upon an employee's request, to provide their employees with copies of any recording or transcript of a personnel hearing. This bill authorizes cities to charge direct duplication fees for copies of recordings and transcripts.

K-12 SCHOOL DISTRICTS

SB 1419 - "Personal service contracts"

Allows K-12 districts and community college districts to contract out (to businesses or individuals) for non teaching services, under defined, limited conditions. The conditions are parallel to those which limit the state in contracting out for public services.

Cost savings may be the basis for a decision to contract out for services, with a long series of factors to be considered, including: the contracting out does not cause displacement of current employees; contractor's wages must be at school district level; the cost saving calculation must include the cost of school district oversight of contractor, and likely future cost increases.

The new law says nothing about negotiations with unions about either the decision to contract out or about the effects.

K-12 AND COMMUNITY COLLEGE DISTRICTS:

AB 500 - Hiring of short-term employees

For K-12 and Community College districts, the governing board of the district, if it wishes to hire a short-term employee, exempt from the classified service, must specify the services to be provided and identify the ending date. [This began as a bill requiring school districts to provide sick leave and all other benefits required by law to temporary employees].

COMMUNITY COLLEGE DISTRICTS

SB 2028 - Requires every community college district to adopt an "equal employment opportunity plan" and an "equal employment opportunity program" and requires the statewide board of governors to adopt regulations on the subject.

HEERA EMPLOYERS (UC AND HASTINGS)

AB 2883 - UC and Hastings negotiations.

In collective bargaining, if parties reach impasse, and go through fact-finding procedures, findings of the fact-finding panel MUST be made public 10 days after delivery to the parties. (Legislature wants Regents to act on the recommendations within 90 days after their receipt.)

Public Sector Law Annual Conference

April 4, 2003 in Sacramento

SAVE THE DATE!

NLRB and Ethics Rules

Continued from Page 10

parties. As noted above, Model Rule 4.2 does not forbid a lawyer from communicating with a person the lawyer knows to be represented by another lawyer if the communication "is authorized…by law." This provision is explained as follows:

> Communications authorized by law may also include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings. When communicating with the accused in a criminal matter, a government lawyer must comply with this Rule in addition to honoring the constitutional rights of the accused.

Model Rules, Comment 5, p. 91. Simply put, the ABA rules do not prohibit NLRB agents from communicating with represented parties or their supervisory employ ees while investigating non-criminal conduct in preparation for possible adminis trative proceedings against them.

California's Rule 2-100 also expressly permits government agents to speak to agents and employees of represented parties:

> (C) This rule shall not prohibit:
>
> (1) Communications with a public officer, board, committee or body; or…
>
> (3)Communications otherwise authorized by law.

California Rule 2-100(C).

b. The ABA and California Rules do not Restrict Contacts with Former Employees. The NLRB memorandum also errs in requiring Washing ton's consent before an attorney or field examiner can communicate with a former supervisor. Both the ABA and California rules freely permit attorneys to communicate with an employer's former supervisors and managers. The com mentary to Model Rule 4.2 states:

> Consent of the organization's lawyer is not required for communication with a former constituent… In communi cating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization.

Model Rules, Comment 7, pp. 91-92.

California's rule is similar. Rule 2-100(B), which forbids counsel from speaking to current managers and supervisors, was promulgated in response to decisions restricting communications with former managers and current rank- and-file employees. The predecessor to Rule 2-100 had been read to forbid communication with all current and former employees of a business enterprise, even those who had no power to bind the business. *See, e.g., Bobele v. Superior Court*, 199 Cal. App. 3d 708, 712-13 (1988); *Mills Land & Water Co. v. Golden West Refining Co.*, 186 Cal. App. 3d 116, 126 (1986).

Under current Rule 2-100(B)(2), an opposing attorney is permitted to speak to former employees even if they were managers or supervisors with power to make admissions that are binding on their former employer. *Continental Ins. Co. v. Superior Court*, 32 Cal. App. 4th 94, 119 (1995); *Nalian Truck Lines, Inc. v. Nakano Warehouse & Transportation Corp.*, 6 Cal. App. 4th 1256 (1992). If there is a danger that the attorney-client privilege may be breached:

> Litigants such as defendants, who are concerned that privileged or confidential information may be publicly dis closed by their former employee, should seek an appropriate protective order.

Neal v. Health Net, Inc., 100 Cal. App.4th 831,123 California Rptr. 2d 202, 218 (2002).

c. The ABA and California Rules do not Restrict Communications by Non-Lawyers. Finally, the NLRB policies unnecessarily restrict communica tions by field examiners, who are non-attorneys. The cases recognize that government investigators are not always attorneys, and that they do not always act as agents or under the direction of an attorney. *State v. Piorkowski*, 700 A.2d 1146 (Conn. 1997) (no ethical violation where police officers interviewed repre sented defendant at jailhouse after first contacting state's attorney since police were not acting as agents of state's attorney); *State v. P.Z.*, 703 A.2d 901 (N.J. 1997) (defendant's statements made to state social worker and passed on to prosecutor did not violate Model Rule 4.2).

Under the same analysis, NLRB field examiners, at least when supervised by non-attorneys, should be able to freely communicate with all possible wit nesses to a possible unfair labor practice.

d. Federal Lawyers are Required to Comply with State Ethics Rules, Not Ethics Rules Promulgated by Their Agency. The new NLRB policy has as its stated goal "to safeguard Board attorneys from ethics violations" regardless of the jurisdiction in which they practice. Memorandum, n.1. Since 1999, however, federal law has provided that federal attorneys are "subject to State laws and rules and local Federal court rules, governing attorneys in each state where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State." 28 U.S.C. § 530B. Thus, whether an NLRB attorney is permitted to contact agents of an organiza tion without the consent of the organization's attorney is dependent on the local jurisdiction's ethics rules. As noted, the vast majority of those jurisdictions permit the government attorney's *ex parte* contact.

What's Next?

The Board apparently revised the ULP Casehandling Manual in December 2002 in light of Model Rule 4.2 "to assure that Board agents do not violate ethics rules," real or imagined. Memorandum, p. 1. According to Los Angeles NLRB personnel, however, the Office of General Counsel has agreed to permit Regional staff in California to communicate directly with former supervisors, in recognition that California's Rules of Professional Conduct permit such ex parte contacts.

While this relaxation of policy does not go far enough, it may be worth while for California lawyers to remind the General Counsel or Regional person nel that California disciplinary rules (like Model Rule 4.2) permit ex parte commu nications by government personnel (including NLRB agents) conducting non- criminal investigations.

Settle the Case?

Continued from Page 2

ous claims may be improperly dissuaded from pressing forward…" The Greene court agreed that any reduction in Greene's request for fees based on an informal settlement offer would be inconsistent with the incentives provided in the Fair Employment & Housing Act to prosecute discrimination claims.

ANALYSIS

The only time every battle can be won is in hindsight. In litigation, the employer pursues a strategy in light of situations as they arise. In appellate opinions, courts direct the future based on the strategies of the past. Though the employer in Greene no doubt pursued what it felt to be the most advantageous strategy, the court in Greene provides some sobering lessons for the future.

PUT THE SETTLEMENT OFFER IN THE FORM OF A §998 OFFER

The holding in Greene is clear if there is no §998 offer, there is no protection from post-offer attorney's fees. In Greene, the employer offered $1 million, far in excess of what the jury eventually provided to plaintiff. However, perhaps because the mediation was too close to trial, the employer never put that offer in the form required by §998. A §998 offer may be made as close as 10 days prior to trial. Though the employer would bear the expense of whatever discovery is pursued while the §998 offer is open, as learned from the Greene case, those expenses pale in comparison to the potential recovery for attorney's fees.

MAKE THE §998 OFFER EARLY

There are two reasons for making the §998 offer early. First, the earlier the offer is made, the more work the employee's attorney will have to perform (and potentially not recover for) if the offer is rejected. Second, the §998 offer must include the fees and costs the employee has incurred in pursuing the claim up until the time of the offer. In Greene, the parties litigated for almost two years before a §998 offer was made in the amount of $50,000. Given the attorneys' fees incurred by plaintiff during the two years before that offer, any monetary recovery by plaintiff at trial when added to the pre-offer fees and costs probably would have exceeded that offer.

MAKE THE OFFER HIGH ENOUGH

The §998 offer the employer made was barely more than 10% of the eventual jury verdict. In valuing a potential §998 offer, the employer should consider: 1) The potential verdict, 2) The fees and costs incurred by the employee in pursuing the claim to date, and 3) The amount of money the employer will spend on its own attorney to obtain a defense verdict. The §998 offer strategy in Greene was most likely driven by the fact that the employer had what it felt was a successful motion for summary judgment pending. However, when that motion was denied one month before trial, the employer was forced to increase its offer substantially. Ultimately it received no benefit from having made the increased offer.

AVOID INTANGIBLE CONDITIONS

The Greene court suggested that even if the employer had put its $1 million offer in the form required by §998, the court may have refused to limit the attorneys' fees award because the §998 offer was not definite enough. The bright-line test for §998 offers is whether the verdict at trial exceeded the amount offered. The fact that the employer required a confidentiality agreement as a condition of settlement would make it "difficult for a judge to calculate the value to the litigant of vindication in a public form, even if the judgment is ultimately less favorable monetarily than the settlement offer." A trial court in such a circumstance would be forced to place a monetary value on the confidentiality agreement, then add that value to the verdict to determine if the verdict exceeded the §998 offer. In contrast, where the offer is simply limited to a dismissal contingent on execution of a release, courts are much more likely to simply look at the dollar amount of the offer and compare it to the jury verdict.

There are harassment cases where no money should ever be offered—but they are few and far between. There are clients who can afford a scorched-earth defense—but they are few and far between. Unfortunately, many lawyers will recommend both of those strategies to the employer— at least until 4-6 weeks before trial. All the while, the meter is running for the employee's attorney. Make those motions, resist discovery, and notice those depositions: so long as the case gets past summary judgment, the employee's attorney doesn't care. In the end, so long as the ex-employee gets any monetary verdict, the employee's attorney will get that money back.

Put out a realistic §998 offer early in the case, and you will stop the employee's attorney in his/her tracks: Now the financial pressure of discovery, motions and trial shifts to the employee's attorney. If the offer is rejected and the verdict and costs incurred prior to the §998 offer don't exceed the §998 offer, the employee's attorney did all the post-§998 offer work for nothing. At the very least, an employer's §998 offer should provoke a come-to-(choose your deity) discussion between the employee and the attorney. If the §998 offer is realistic, but the employee cannot be swayed from harboring champagne dreams and caviar wishes, the employer may find itself in the enviable position of defending the case against an emotional and embittered in pro per.

The Labor and Employment Section Is Everywhere!

Executive Committee members have now conducted half-day educational programs (with CLE credit) in three different cities - San Bernardino, Chico, and Oxnard, with two more planned, one for Fresno and a second in Riverside. Each program includes three panel discussions on current labor or employment issues. The speakers include one or two members of the Executive Committee, and several experienced employment law attorneys from the county in which the program takes place. Each program is co-sponsored by one or more local bar associations.

The purpose of these "road shows" is to provide useful and timely educational programs to lawyers outside the state's major metropolitan areas, in a location more convenient than the section's annual programs, which are almost always set in either the San Francisco Bay Area, Los Angeles or San Diego.

If you would like a program presented in your area, call the section's State Bar staff coordinators, Carol Banks or Edward Bernard, (415)538-2242 or 538-2468.

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